180 (5)
FILED
JAN 25 2011
OFFICE OF THE CLERK

No. 10-689

IN THE

Supreme Court of the United States

TROY BARBOUR,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeal

BRIEF IN OPPOSITION

LEON A. CANNIZZARO, JR.
Orleans Parish District Attorney
DONNA RAU ANDRIEU
Counsel of Record
Chief of Appeals
DONALD G. CASSELS, III
Law Clerk
ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE
619 South White Street
New Orleans, LA 70119
(504) 822-2414
dandrieu@orleansda.com

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D C 20002

QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the States through the Fourteenth Amendment, prohibits a criminal conviction based on a nonunanimous jury verdict.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	2
I. THIS COURT'S DECISION IN *APODACA V. OREGON* IS ENTITLED TO *STARE DECISIS*	2
II. NEITHER PETITIONER NOR HIS *AMICI CURIAE* HAVE OFFERED THE SPECIAL JUSTIFICATION NECESSARY TO OVERTURN *APODACA V. OREGON*	3
A. The Sixth Amendment Does Not Require Unanimous Verdicts in Criminal Trials	3
1. Constitutional History Does Not Support a Reading Requiring Unanimity	4
2. The Function of the Jury Does Not Support a Reading Requiring Unanimity	6
3. This Court's Recent Jurisprudence Does Not Support a Reading Requiring Unanimity	11
4. Empirical Evidence Does Not Support a Reading Requiring Unanimity	13

TABLE OF CONTENTS—Continued

Page

a. Arguments Offered by Petitioner and His *Amici Curiae* 13

b. Arguments Not Offered by Petitioner and his *Amici Curiae* 16

B. The Fourteenth Amendment Does Not Require Unanimous Criminal Verdicts 16

1. The History of Jury Practices in the United States Does Not Support a Finding that Unanimous Verdicts are a Fundamental Liberty Interest 20

2. Unanimity Is Not a Fundamental Liberty Interest Because It Neither Augments Nor Diminishes the Historical Purpose of the Jury..... 21

CONCLUSION 24

TABLE OF AUTHORITIES

CASES Page

Apodaca v. Oregon, 406 U.S. 404 (1972) ....*passim*
Apprendi v. New Jersey, 530 U.S. 466 (2000).....7, 10, 11, 12
Arizona v. Rumsey, 467 U.S. 203 (1984)..... 3
Blakely v. Washington, 542 U.S. 296 (2004).....7, 11, 12
Booker v. United States, 543 U.S. 220 (2005)..... 11, 12
Crawford v. Washington, 541 U.S. 36 (2004)..... 7
Cunningham v. California, 549 U.S. 270 (2007)..... 9, 10
Dickerson v. United States, 530 US. 428 (2000)..... 3
Duncan v. Louisiana, 391 U.S. 145 (1968).....7, 17, 22
Gideon v. Wainwright, 372 U.S. 335 (1963).. 17
Giles v. California, 554 U.S. 353 (2008)..... 7
In re Oliver, 333 U.S. 257 (1948) 17
In re Winship, 397 U.S. 358 (1970)..... 9, 10
Johnson v. Louisiana, 406 U.S. 356 (1972). 10
Klopfer v. North Carolina, 386 U.S. 213 (1967)..... 17
Matthews v. Eldridge, 424 U.S. 319 (1976). 14
Mattox v. United States, 146 U.S. 140 (1892)..... 13
McDonald v. City of Chicago, 130 S.Ct. 3020 (2010).....4, 11, 12, 13
Michael H. v. Gerald D., 491 U.S. 110 (1989)..... 19
Parker v. Gladden, 385 U.S. 363 (1966)..... 13
Payne v. Tennessee, 501 U.S. 808 (1996)..... 3
Pointer v. Texas, 380 U.S. 400 (1965)..... 17

TABLE OF AUTHORITIES—Continued

Page

Remmer v. United States, 347 U.S. 227 (1954) 13
Reno v. Flores, 507 U.S. 292 (1993) 19
Smith v. Phillips, 455 U.S. 209 (1982) 13
State Oil Co. v. Khan, 522 U.S. 3 (1997) 3
Sullivan v. Louisiana, 508 U.S. 275 (1993). 9, 10
Tanner v. United States, 483 U.S. 107 (1987) 14
Washington v. Glucksberg, 521 U.S. 702 (1997) 18, 19
Washington v. Texas, 388 U.S. 14 (1967) 17
Welch v. Dep't. of Highways & Pub. Transp., 483 U.S. 468 (1987) 2
Williams v. Florida, 399 U.S. 78 (1970) .....*passim*
United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) 7
United States v. Int'l Bus. Mach. Corp., 517 U.S. 843 (1996) 3

CONSTITUTION

U.S. Const. amend. VI .....*passim*
U.S. Const. amend. XIV 11, 24
U.S. Const. amend. XIV, § 1, cl. 3 .....*passim*

STATUTES

La. Rev. Stat. 14:(27)30.1 1
La. C. Cr. P. Art. 782(A) 1

RULES

FED. R. OF EVID. 606(b) 14

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

1 ANNALS OF CONG. 435 (1789) 5

Dennis J. Devine, *et al.*, *Jury Decision Making: 45 Years of Empirical Research in Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y& L. 622 (2001) 15

Edward P. Schwartz & Warren F. Schwartz, *Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules*, 80 GEO. L.J. 775 (1992) 14

Harry Kalven, Jr. & Hans Zeisel, THE AMERICAN JURY 488 (1966) 15

Letter from James Madison to Edmund Pendleton (Sept. 23, 1789), 5 WRITINGS OF JAMES MADISON 424 (G. Hunt ed., 1904) 6

Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1 (1997) 14

Patrick Devlin, TRIAL BY JURY 164 (1956) .. 22

Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367 (1907) 20

S. JOURNAL, 1st Cong., 1st Sess. 71 (Sept. 4, 1789) 5

S. JOURNAL, 1st Cong., 1st Sess. 77 (Sept. 9, 1789) 5

TABLE OF AUTHORITIES—Continued

Page

Shari Seidman Diamond, Mary B. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-unanimous Civil Jury*, 100 NW. U. L. REV. 201 (2006) 14

Valerie P. Hans, *The Power of the Twelve: The Impact of Jury Size and Unanimity*, 4 DEL. L. REV. 2 (2001) 14

William Blackstone, *Commentaries on the Laws of England* (1769) 11

IN THE

Supreme Court of the United States

No. 10-689

TROY BARBOUR,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeal

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The underlying facts involving petitioner's crime do not control this Court's analysis of the constitutional question presented. Nevertheless, for the Court's convenience, respondent recites them in brief.

Petitioner was charged by the State of Louisiana on June 15, 2006 with attempted second degree murder, a violation of Louisiana Revised Statute 14:(27)30.1 He pleaded not guilty at his August 14, 2006 arraignment. Prior to trial, petitioner filed a motion in the state district court seeking that court's declaration of Louisiana Code of Criminal Procedure Article 782(A) as unconstitutional to the extent that it allows for nonunanimous guilty verdicts in non-

capital felony cases. Petitioner's motion was denied. On June 16-17, 2006, petitioner was tried by a twelve-person jury and found guilty as charged by a verdict of 10-2. On June 27, 2008, the State charged petitioner as a fourth-felony habitual offender.

Petitioner filed a post-verdict motion in which he re-urged his pre-trial motion. His motion was denied and he was sentenced to forty-eight years and six months at hard labor without benefit of parole, probation, or suspension of sentence.

Petitioner appealed his conviction, which was affirmed by the Louisiana Fourth Circuit Court of Appeal. Petitioner sought discretionary review in the Supreme Court of Louisiana, which summarily denied his application for review.

REASONS FOR DENYING THE PETITION

Petitioner fails to advance any justification for granting his petition for a writ of certiorari. The foundation of petitioner's request is the argument that this Court's decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), is flawed and must be overturned. For the reasons discussed below, were this Court to grant certiorari, the result mandated by this Court's holding in *Apodaca* would remain unaltered. It is therefore unnecessary for this Court to grant the petition for a writ of certiorari.

I. THIS COURT'S DECISION IN *APODACA V. OREGON* IS ENTITLED TO *STARE DECISIS*.

This Court has stated that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welch v. Dep't. of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987). The fundamental importance of

the doctrine flows from the recognition that it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1996) (internal quotation marks omitted).

That being so, this Court has stated that it "approach[es] the reconsideration of [its] decisions . . . with the utmost caution." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). "Even in constitutional cases, the doctrine carries such persuasive force that [this Court has] always required a departure from precedent to be supported by some 'special justification.'" *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996). (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1996))); *see also Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

II. NEITHER PETITIONER NOR HIS *AMICI CURIAE* HAVE OFFERED THE SPECIAL JUSTIFICATION NECESSARY TO OVERTURN *APODACA V. OREGON*.

A. The Sixth Amendment Does Not Require Unanimous Verdicts in Criminal Trials.

Petitioner contends that the Sixth Amendment to the Constitution impliedly requires that the verdicts of all criminal juries be unanimous. It does not. The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein

> the crime shall have been committed, which district shall have been previously ascertained by law . . . .

U.S. CONST. amend. VI.

1. Constitutional History Does Not Support a Reading Requiring Unanimity.

This Court has twice recited the relevant history of the drafting of the Sixth Amendment: first, in *Williams v. Florida*, 399 U.S. 78 (1970), and later in *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion). In *Williams*, this Court concluded that, although twelve-member juries were the historical standard at common law, the Sixth Amendment did not require that the number of jurors be fixed at twelve. 399 U.S. at 102-03. In *Apodaca*, the plurality concluded that the Sixth Amendment did not require unanimous verdicts.[1]

Petitioner contends that the *Apodaca* plurality's conclusion was incorrect because unanimous verdicts

---

[1] As this Court recently noted in a footnote to its decision in *McDonald v. City of Chicago*, its ruling in *Apodaca*

> was the result of an unusual division among the Justices . . . . [F]our Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either federal or state criminal trials . . . . [F]our other Justices took the view that the Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials . . . . Justice Powell's concurrence in the judgment broke the tie, and he concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases.

130 S.Ct. 3020, 3035 (2010). The result is, therefore, that defendants in state criminal proceedings, like the petitioner, may constitutionally be either convicted or acquitted by a nonunanimous verdict.

were the common law practice among the colonies at the time the Sixth Amendment was ratified and must therefore be assumed to have been preserved therein. However, as this Court noted in *Williams*, "constitutional history casts considerable doubt on the easy assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." 399 U.S. at 92-93.

That constitutional history, as detailed by this Court in *Williams*, demonstrates that the Sixth Amendment was the result of a contentious drafting process, during which the language of the amendment underwent considerable evolution. *See id.* at 94-97. The first draft of the language, as introduced by James Madison in the House, read, in relevant part:

> The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, *with the requisite of unanimity for conviction*, of the right of challenge, and other accustomed requisites . . . .

1 ANNALS OF CONG. 435 (1789). Although this draft passed the House, it failed in the Senate and was returned to the House considerably altered. S. JOURNAL, 1st Cong., 1st Sess. 71 (Sept. 4, 1789). The Senate Journal indicates that the clause requiring unanimity was stricken. *Id.* The Senate Journal also indicates that a subsequent motion to restore the words providing for "the requisite of unanimity for conviction" failed to be adopted. S. JOURNAL, 1st Cong., 1st Sess. 77 (Sept. 9, 1789). To resolve the chambers' differences, a conference committee was formed. That committee refused to accept not only the original House language but also

an alternate suggestion by the House conferees that juries be defined as possessing "the accustomed requisites." Letter from James Madison to Edmund Pendleton (Sept. 23, 1789), *in* 5 WRITINGS OF JAMES MADISON 424 (G. Hunt ed., 1904). The draft that ultimately emerged from the committee provided, in relevant part, only for

> the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .

Williams v. Florida, 399 U.S. 78, 94 (1970). It is this draft that was subsequently adopted as the Sixth Amendment; notably absent from it is any reference to unanimity. Thus, the foregoing history casts considerable doubt on the argument that the Sixth Amendment should be read to require that the verdicts of all criminal juries be unanimous. *See Apodaca v. Oregon*, 406 U.S. 404, 409-10 (1972).

2. The Function of the Jury Does Not Support a Reading Requiring Unanimity.

In an attempt to discredit the *Apodaca* plurality's analysis for its thoroughness, petitioner fixates on the plurality's assertion that its inquiry must focus "upon the function served by the jury *in contemporary society*." 406 U.S. at 410 (citing *Williams*, 399 U.S. at 99-100) (emphasis added). Petitioner argues that the analysis prompted by that statement is inherently flawed because it looks beyond the historical tradition of the common law at the time the Sixth Amendment was ratified. To substantiate his argument, petitioner directs this Court's attention to a

number of cases purporting to disapprove such an analysis: *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Crawford v. Washington*, 541 U.S. 36 (2004); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); and *Giles v. California*, 554 U.S. 353 (2008).

Petitioner's argument is moot. Defining the function of the jury, the *Apodaca* plurality looked to this Court's prior jurisprudence:

> As we said in *Duncan*, the purpose of trial by jury is to prevent oppression by the Government by providing a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. at 156. "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . ." *Williams v. Florida*, *supra*, 399 U.S. at 100.

Apodaca, 406 U.S. at 410. The reasoning of this Court's prior decisions in *Duncan* and *Williams* focused on the *historical* function of the jury. In borrowing the definition as stated in those cases, the *Apodaca* plurality implicitly recognized that the function of the jury has not changed over the course of its history. Accordingly, even if the cases cited by petitioner prohibit any but an historical construction of the Sixth Amendment, petitioner's argument is moot because the contemporary definition of the jury's function is identical to the historical definition thereof.

Petitioner next argues that where a jury is not required to return a unanimous verdict, the function of the jury, as described by this Court, will be frustrated. However, as the *Apodaca* plurality noted, this Court has also stated:

> The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community.

Williams, 399 U.S. at 100; *Apodaca*, 406 U.S. at 410-11. Inasmuch as *Williams* stands for the proposition that the Constitution allows juries of less than twelve, it is difficult to perceive a qualitative difference between a jury composed of ten returning a unanimous verdict and a jury composed of twelve returning a majority verdict of ten. In either case, the defendant has had the benefit of a trial by a jury of his peers, affording him the interposition of the commonsense judgment of a group of laymen. Moreover, the burden placed upon the State in achieving such a conviction is identical—it must convince ten citizens of the accused's guilt beyond a reasonable doubt.

Notably, although the plurality opinion in *Apodaca* limited its reference to *Williams* to only the foregoing language, *Williams* went on to state:

> We find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained. And, certainly the relia-

> bility of the jury as a factfinder hardly seems likely to be a function of its size.

399 U.S. at 101. At first glance, this language might appear to lend support to an argument in favor of unanimity. However, the *Williams* Court included the following footnote:

> We intimate no view whether or not the requirement of unanimity is an indispensable element of the Sixth Amendment jury trial. While much of the above historical discussion applies as well to the unanimity as to the 12-man requirement, the former, unlike the latter, may well serve an important role in the jury function, for example, as a device for insuring that the Government bear the heavier burden of proof.

Id. at 101 n.46.

Just prior to this Court's decision in *Williams*, the case of *In re Winship* was decided. In *In re Winship*, this Court announced unequivocally:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.[2]

---

[2] Petitioner attempts to contradict the plain meaning of this language by invoking this Court's decision in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and *Cunningham v. California*, 549 U.S. 270 (2007). That attempt is misguided. Notwithstanding petitioner's assertion to the contrary, *Sullivan* is as unequivocal as *In re Winship* as to the constitutional source of the reasonable doubt standard:

In re Winship, 397 U.S. 358, 364 (1970). Taken together, the two cases thus raised the question of whether the Due Process Clause, and not the Sixth Amendment, requires unanimity. That question was answered with equal certainty by this Court in the companion case to *Apodaca*, *Johnson v. Louisiana*, 406 U.S. 356 (1972). Noting that dissention in a verdict betokens neither failure by the State to carry its burden nor the unsoundness of the judgment of the majority, this Court expressly held that the Due Process Clause does not mandate unanimity of verdicts. *Johnson*, 406 U.S. at 362-63. Accordingly, even if there were a constitutional requirement of unanimity, such requirement could only be found in

---

> What the factfinder must determine to return a verdict of guilty is prescribed *by the Due Process Clause*. The prosecution bears the burden of proving all elements of the offense charged and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements. This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings.

Sullivan, 508 U.S. at 277-78 (emphasis added). That this Court noted that the Due Process Clause and the Sixth Amendment are "interrelated" is by no means inconsistent with the assertion in both *Johnson* and *Sullivan* that the requirement of proof beyond a reasonable doubt emanates solely from the Due Process Clause. *Id.* at 278.

Cunningham, too, fails to give petitioner the support he seeks. That case addressed the constitutionality of a law permitting judges to find facts by a preponderance of the evidence. *Cunningham*, 549 U.S. at 274. In striking down the law, this Court relied heavily on its prior ruling in *Apprendi v. New Jersey*, in which it stated, "[This] Court has held that due process requires that the jury find beyond a reasonable doubt every fact necessary to constitute the crime." 530 U.S. 466, 499-500 (2000) (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

the Sixth Amendment—a reading which neither history nor policy supports.

3. This Court's Recent Jurisprudence Does Not Support a Reading Requiring Unanimity.

Petitioner argues that this Court's recent jurisprudence offers support for the notion that, under the common law at the time the Sixth Amendment was ratified, juries were required to return unanimous verdicts. Attempting to marshal support for this argument, petitioner invokes the dicta of this Court, warping the meaning of this Court's statements by stripping them of context and cloaking them in textual artifice. In particular, Petitioner points to statements made by this Court in *Apprendi v. California*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *Booker v. United States*, 543 U.S. 220 (2005); and *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).[3]

Petitioner first directs this Court's attention to its quotation in *Apprendi*, *Blakely*, and *Booker* of William Blackstone's *Commentary on the Laws of England* (1769): "[T]he truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ."[4] *Apprendi*,

---

[3] It is worth noting that only three of the cases cited by petitioner—*Apprendi*, *Blakely*, and *Booker*—dealt with the Sixth Amendment. *McDonald*, by contrast, dealt with the incorporation of the Second Amendment against the States through the Due Process Clause of the Fourteenth Amendment.

[4] In *Blakely*, this Court omitted the words "whether preferred in the shape of indictment, information, or appeal."

530 U.S. at 477; *Blakely*, 542 U.S. at 301; *Booker*, 543 U.S. at 239.

In both *Apprendi* and *Booker*, this Court italicized the phrase "the truth of every accusation." A review of *Apprendi, Blakely*, and *Booker* reveals that the intended focus of those cases was to clarify (1) that the Sixth Amendment requires all facts tending to influence the sentence imposed on a defendant be found solely by a jury and (2) that the Due Process Clause requires that all facts tending to influence the sentence imposed on a defendant be found beyond a reasonable doubt. In none of those cases did this Court purport to determine whether juries were required, as a matter of constitutional law, to return unanimous verdicts.

Ignoring this focus, petitioner has chosen to italicize the word "unanimous," the effect of which is to draw the reader's attention away from the emphasis placed by this Court on the phrase "the truth of every accusation" and toward a passing reference to "unanimous suffrage," thereby giving the reader a false impression of the language's intended purpose. To suggest that this Court's use of such language signals its tacit approval of a rule requiring unanimity is utterly inconsistent with its context.

Petitioner next asserts that this Court "flatly stated in *McDonald* that 'the Sixth Amendment right to trial by jury requires a unanimous jury verdict.'" What this Court actually stated in a footnote to its decision in *McDonald*—which addressed incorporation of the right to bear arms—was that "[this] Court has held that although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials."

McDonald, 130 S.Ct. at 3035 n.14 (citing *Apodaca v. Oregon*, 406 U.S. 404 (1972).

Accordingly, notwithstanding petitioner's assertions to the contrary, none of this Court's recent jurisprudence supports his contention that the Sixth Amendment requires unanimous verdicts.

4. Empirical Evidence Does Not Support a Reading Requiring Unanimity.

a. Arguments Offered by Petitioner and His *Amici Curiae*.

Petitioner and his *amici curiae* argue, essentially, that the thoroughness of jury deliberation suffers where a unanimous verdict is not required. Attempting to support such an argument, they cite "empirical evidence." However, the fundamental and fatal flaw in the argument is that it assumes that there is a constitutional metric against which the thoroughness of jury deliberation may be measured. There is not.

Although this Court has had the occasion to examine the deliberative process through a constitutional lens, such cases have dealt exclusively with the exertion of improper influence on the deliberative process from sources external to the jury itself. *See, e.g.*, *Smith v. Phillips*, 455 U.S. 209 (1982) (juror in criminal trial had submitted an application for employment at the district attorney's office); *Parker v. Gladden*, 385 U.S. 363 (1966) (bailiff made comments about defendant); *Remmer v. United States*, 347 U.S. 227 (1954) (bribe offered to juror); *Mattox v. United States*, 146 U.S. 140 (1892) (newspaper article read to jurors). This Court has never had the occasion to examine the substance of deliberations

themselves to determine whether they were sufficiently thorough to protect the constitutional rights of a defendant. To some extent, this is necessarily so because jurors are not permitted to testify as to the substance of their deliberations. *See Tanner v. United States*, 483 U.S. 107 (1987); FED. R. EVID. 606(b). Nevertheless, petitioner and his *amici curiae* attempt to persuade this Court by reference to bare statistics not only that there is a constitutional standard for measuring the thoroughness of jury deliberation but also that, in jurisdictions permitting nonunanimous verdicts, such a practice will necessarily fail of such a standard. The studies relied upon by petitioner and his *amici curiae* do not support such a conclusion.

Additionally, as this Court has noted, "bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process." *Matthews v. Eldridge*, 424 U.S. 319, 346 (1976). A number of the studies heavily relied upon by petitioner and his *amici curiae* were of either mock juries or civil juries.[5] The deliberations of such juries cannot be said to be representative of the deliberations of real juries empanelled in real criminal trials, the potential outcome of which may require the privation of the liberty of a fellow citizen.

---

[5] *See, e.g.*, Shari Seidman Diamond, Mary B. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Nonunanimous Civil Jury*, 100 NW. U. L. REV. 201 (2006); Valerie P. Hans, *The Power of the Twelve: The Impact of Jury Size and Unanimity*, 4 DEL. L. REV. 2 (2001); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1 (1997); Edward P. Schwartz & Warren F. Schwartz, *Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules*, 80 GEO. L.J. 775 (1992).

Moreover, the proffered data do not present an accurate picture of the totality of the research. For example, in a study cited repeatedly by both petitioner and his *amici curiae*, it is noted that "[w]hen the distribution of verdict preference was compared with final verdicts . . . one of the most robust and widely replicated findings in jury research [emerged]: The verdict preferred by the majority of jurors on the first ballot was the jury's final verdict over 90% of the time."[6]

Petitioner and his *amici curiae* also advance arguments for which they offer no empirical support. For example, in one section of its brief *amicus curiae* discussing minority[7] jurors, the American Bar Association quotes the following passage from an article published in *Harvard Law Review*: "[I]f—as is often true—the views of jurors of color and female jurors diverge from the mainstream, nonunanimous decisionmaking rules can operate to eliminate the voice of difference on the jury." Neither the ABA's

---

[6] Dennis J. Devine *et al.*, Jury Decision Making: 45 Years of Empirical Research in Deliberating Groups, 7 PSYCHOL. PUB. POL'Y & L. 622, 623 (2001) (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 488 (1966)). It is noteworthy that petitioner, citing to this study, states that "10-2 ballots . . . result in guilty verdicts in unanimity regimes only 64.7% of the time." Petitioner's Brief at 35 (citing Devine, *supra*, at 692 tbl. 6).

[7] Although the studies upon which the American Bar Association relies refer almost exclusively to "minority" jurors in the sense of that word connoting those holding dissenting views, the ABA's brief *amicus curiae* improperly conflates that meaning of the word with its racial counterpart. *See, e.g.*, Brief of the American Bar Association as *Amicus Curiae*, p. 12 ("The ABA concluded that 'minority jurors participate more actively when decisions must be unanimous.'").

amicus brief nor the original article cites any authority for such an assertion.

b. Arguments Not Offered by Petitioner and his *Amici Curiae*.

Worthy of note are the arguments left unmade by petitioner and his *amici curiae*. First, neither petitioner nor his *amici curiae* attempt to argue that there is any correlation between nonunanimous verdicts and wrongful convictions. Second, although petitioner and his *amicus curiae*, the Houston Institute for Race and Justice, imply that Louisiana's practice of allowing nonunanimous verdicts is a vestige of the State's regrettable history on the issue of race, neither petitioner nor his *amici curiae* attempt to argue that there is any correlation between nonunanimous verdicts and the race of defendants so convicted. Finally, neither petitioner nor his *amici curiae* attempt to argue that there is any correlation between nonunanimous verdicts and the gender of defendants so convicted. These arguments are not offered by petitioner and his *amici curiae* because there is no support for them in the scientific literature.

In sum, the empirical evidence that petitioner and his *amici curiae* rely upon falls far short of raising the special justification necessary for overturning the settled holding of this Court's decision in *Apodaca v. Oregon*.

B. The Fourteenth Amendment Does Not Require Unanimous Criminal Verdicts.

Petitioner contends that if, as he also contends, the Sixth Amendment requires federal juries to return unanimous verdicts, the Due Process Clause of the

Fourteenth Amendment necessarily mandates that such requirement be incorporated against the States. Such a contention proceeds from a misapprehension of this Court's approach to the Incorporation Doctrine. Encapsulated within the first eight amendments are manifold "liberty interests." This Court has taken a deliberate and individualistic approach to incorporation of liberty interests, particularly where they have emanated from the Sixth Amendment. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968) (trial by jury in criminal cases); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront adverse witness); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (assistance of counsel); *In re Oliver*, 333 U.S. 257 (1948) (right to a public trial).

In determining the manner and extent to which federally guaranteed liberty interests are incorporated against the States, this Court has expressed circumspection:

> [W]e have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court . . . .

Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (internal citations and quotation marks omitted). With such circumspection as its guide, this Court has also articulated a methodology for determining whether a liberty interest guaranteed by the federal Constitution is so fundamental as to merit incorporation against the States:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," [*Moore v. East Cleveland*] at 503 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105, (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. [*Reno v.*] *Flores*, *supra*, at 302; *Collins* [*v. Harker Heights*], *supra*, at 125; *Cruzan* [*v. Director, Missouri Department of Health*], *supra*, at 277-278. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," *Collins*, *supra*, at 125, that direct and restrain our exposition of the Due Process Clause.

Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997). Thus, to determine whether a federally guaranteed liberty interest is incorporated against the States, it must be described, and then, so described, it must be found to be "fundamental."

This Court has spoken to the appropriate method by which to describe a liberty interest for purposes of this Due Process analysis. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 126 n.6 (1989) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."); *Reno v. Flores*, 507 U.S. 292, 302 (1993) ("'Substantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'"); *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997) ("[T]he Court has required a 'careful description' of the asserted fundamental liberty interest.") In light of this Court's careful approach to defining an asserted liberty interest at its most specific level, the liberty interest at stake in this case may thus be described as the right to be convicted or acquitted solely by a jury whose verdict is unanimous. Having so defined the liberty interest, it remains to determine whether that interest is so "fundamental" as to be "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 721.

1. The History of Jury Practices in the United States Does Not Support a Finding that Unanimous Verdicts are a Fundamental Liberty Interest.

This Court has had the occasion both to review the history of the Sixth Amendment and to interpret its meaning through the lens of the historical common law. *See, e.g., Williams v. Florida*, 399 U.S. 78 (1970). In *Williams*, this Court examined whether the colonies had mechanically received the entirety of English common law, noting:

> "While [the Framers'] general legal conceptions were conditioned by, and their terminology derived from, the common law, the early colonists were far from applying it as a technical system, they often ignored it or denied its subsidiary force, and they consciously departed from many of its most essential principles."

399 U.S. at 98 n.45 (quoting Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 415 (1907)). The implication of the foregoing assessment is that the colonies were discriminating as to which of the various elements of the English common law were to be received into the American tradition. "With respect to the jury trial in particular," this Court continued:

> [W]hile most of the colonies adopted the institution in its English form at an early date, more than one appears to have accepted the institution at various stages only with 'various modifications.' See [Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367,

> 412 (1907)]. Thus Connecticut permitted majority decision in case of continued failure to agree, *id.*, at 386 . . . Pennsylvania permitted majority verdicts and employed juries of six or seven, *id.*, at 398, and the Carolinas discontinued the unanimity requirement, 5 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 2781 (1909) (Art. 69, 'Fundamental Constitutions of Carolina'). See also [F. Heller, The Sixth Amendment 13-21 (1951)].

Id. Although such facts were ancillary to this Court's ultimate holding in *Williams*, they are immediately relevant to the question presented by this case. To the extent that at various times four of the thirteen original colonies affirmatively rejected the notion that the common law required unanimity of verdicts, it is difficult to perceive how such a requirement could be said to have been fundamental in the context of our Nation's history and traditions. Accordingly, because our history and tradition do not support a finding that the right asserted by petitioner is fundamental, this Court's Due Process jurisprudence does not approve its incorporation against the States.

2. Unanimity Is Not a Fundamental Liberty Interest Because It Neither Augments Nor Diminishes the Historical Purpose of the Jury.

In determining whether the right advocated by petitioner is fundamental, it is also instructive to consider the historical purpose of the jury itself. That purpose was accurately described by the plurality in *Apodaca v. Oregon*:

> [T]he purpose of trial by jury is to prevent oppression by the Government by providing a

> "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. at 156. "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . ." *Williams v. Florida*, *supra*, 399 U.S. at 100.

406 U.S. 404, 410 (1972). This Court, in its decision in *Duncan*, cited by this Court in both *Williams* and *Apodaca*, relied on the work of noted jurist and historian Patrick Devlin for its description of the historic role of the jury:

> The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.

Duncan, 391 U.S. at 155 n.23 (quoting PATRICK DEVLIN, TRIAL BY JURY 164 (1956)) (internal quotations omitted). Having considered the foregoing, the *Apodaca* plurality concluded:

> A requirement of unanimity . . . does not materially contribute to the exercise of this commonsense judgment . . . In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce

> hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.

Apodaca, 406 U.S. at 410-11. Petitioner has advanced no arguments that contradict such a conclusion. Accordingly, while undeniably the right to a trial by jury is fundamental, the requirement of unanimity—because it neither augments nor diminishes the historical purpose served by the jury—is not. To hold otherwise would be to "forever codif[y] a feature . . . incidental to the real purpose of the [Sixth] Amendment" and "ascribe a blind formalism to the Framers" of our Constitution. *Williams v. Florida*, 399 U.S. 78, 102-03 (1970).

CONCLUSION

For nearly forty years, States have relied on the clear result of this Court's decision in *Apodaca*: Jury verdicts in State criminal proceedings need not be unanimous. Neither the Sixth Amendment nor the Fourteenth Amendment compels a different conclusion, and petitioner has failed to provide any justification for disturbing the settled precedent of this Court. Moreover, even if this Court were to grant petitioners request, the result which *Apodaca* approves would remain unaltered. Accordingly, his request for writ of certiorari should be denied.

Respectfully submitted,

LEON A. CANNIZZARO, JR.
Orleans Parish District Attorney
DONNA RAU ANDRIEU
Counsel of Record
Chief of Appeals
DONALD G. CASSELS, III
Law Clerk
ORLEANS PARISH DISTRICT
ATTORNEY'S OFFICE
619 South White Street
New Orleans, LA 70119
(504) 822-2414
dandrieu@orleansda.com

Counsel for Respondent